NO. 80-33

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SMITTY BAKER COAL COMPANY, INC.,
Petitioner,

v.

UNITED MINE WORKERS OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
THE JURY, BY SPECIAL VERDICT, PROPERLY FOUND SHERMAN ACT VIOLATIONS UNDER PROPER INSTRUCTIONS	2
DIFFERENT AND MORE STRINGENT SHERMAN ACT STANDARDS APPLIED TO CASE AFTER JURY VERDICT	4
THE PROVINCE OF THE JURY AND ITS SPECIAL VERDICT WERE INVADED BY BOTH COURTS BELOW	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

AMAX Coal Co. v. NLRB, 614 F.2d 872 (3d Cir. 1980)	3
American Tobacco Company v. U. S., 328 U.S. 781, 809	6
Blue Diamond Coal Company v. UMW, Civil Docket No. 6189, E.D. Tenn. (no appeal) .	4
In Re International Union, UMW, et al., 188 NLRB No. 121 (1971)	3
Interstate Circuit v. U. S., 306 U.S. 208, 227	6
McLain v. Real Estate Board of New Orleans, Inc., 100 S.Ct. 502, 509 (1980)	2
Pennington v. UMW 325 F.2d 804	4

Scotia Coal Company v. UMW,
No. 76-2485 in the Sixth Circuit (1978) 4
South-East Coal Co. v. UMW and Consolidation Coal Company,
434 F.2d 767 4
Tennessee Consolidated Coal Company v. UMW,
416 F.2d 1192 4
U. S. v. American Tobacco Company,
221 U.S. 106 6
U. S. v. Griffith,
334 U.S. 100 (1948) 2
U. S. v. U. S. Gypsum Co.,
438 U.S. 422, 436, N.13 (1978) 2
U. S. v. Yellow Cab Co.,
338 U.S. 338, 341 (1941) 4

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UMW admits, and it is otherwise undisputed, that the Fourth Circuit held that, in order to find a violation of the

Sherman Act, "the agreement must be rooted in an anti-competitive purpose *and* must effect an anticompetitive result . . .".[1] (emphasis supplied) This conjunctive standard is not in accord with the disjunctive standard of liability for civil Sherman Act cases. Just last term, this Court again stated:

> ". . . in a civil action under the Sherman Act, liability may be established by proof of either an unlawful purpose *or* an anticompetitive effect." *McLain v. Real Estate Board of New Orleans, Inc.*, 100 S.Ct. 502, 509 (1980).[2]

By requiring that petitioner prove both anticompetitive purpose (or predatory intent) *and* an anticompetitive result, the Fourth Circuit grievously departed from years of precedent carefully developed by this Court and the other circuits. That error must be corrected now or civil antitrust plaintiffs will be haunted by it for years to come.[3]

THE JURY, BY SPECIAL VERDICT, PROPERLY FOUND SHERMAN ACT VIOLATIONS UNDER PROPER INSTRUCTIONS

The conspiracy proven and found by the jury and the Trial Court was the agreement between UMW and BCOA

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[1] Brief in Opposition, p. 16, quoting the Fourth Circuit, 620 F.2d 431-32.

[2] In U. S. v. U. S. Gypsum Co., 438 U.S. 422, 436, N.13 (1978), this Court likewise noted that, "a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." (emphasis supplied) Also see U. S. v. Griffith, 334 U.S. 100 (1948), discussed at pp. 27-28 of the Petition.

[3] It has taken this case some five years to make its way from the jury to the doors of this Court.

(1) that UMW would bargain only with BCOA to the exclusion of all other units;

(2) that BCOA members and all signatories would be obligated to aid UMW organizing by refusing to lease coal lands except to operators who would sign the UMW-BCOA contract[4]; and, non-UMW coal would be penalized; and,

(3) that UMW would not deviate from the terms of the UMW-BCOA contract for any operator.

The record is replete with evidence of the conspiracy, both express and implied. UMW knew when it struck petitioner it would not, indeed could not, negotiate with petitioner. It knew there could be no agreement from UMW's side until terms were reached with BCOA. And that is precisely what happened. Petitioner's mines sat inoperative without even maintenance work being allowed while UMW refused to bargain with petitioner, but rather, bargained solely with BCOA for the entire industry. Petitioner could only watch helplessly as acid mine water destroyed his equipment and his mines caved in for lack of maintenance.

The *fact* of petitioner's damage from the strike or refusal to bargain pursuant to the conspiracy was not challenged by UMW. In fact, the jury's damage award was approximately the dollar amount as calculated by UMW's proof. UMW argued to the jury that petitioner's hiring of rival union employees some six weeks or so following the onset of the strike and refusal to bargain by UMW, constituted an intervening cause of petitioner's damages. The factual and legal arguments advanced in UMW's brief, here, were presented to the jury.

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[4] The Coal Lands clause is an illegal signatory only provision - not a union standards provision. **AMAX Coal Co. v. NLRB**, 614 F.2d 872 (3d Cir. 1980). In any event, UMW cannot seek to preserve work opportunities and standards for a single industry-wide unit. **In Re International Union, UMW, et al.**, 188 NLRB No. 121 (1971).

The jury was properly instructed that liability could be established by proof of unlawful purpose *or* proof of unlawful means or effect. (1164a) Based upon this unchallenged correct statement of the law, the jury, by special verdict form, found an unlawful Sherman Act conspiracy which resulted in the damages suffered by petitioner. The jury had every right to reject the factual and legal arguments of UMW.[5]

In the six cases in which juries have been asked to determine if a UMW-BCOA conspiracy actually existed, all six, including this one, have resulted in verdicts in the affirmative.[6]

DIFFERENT AND MORE STRINGENT SHERMAN ACT STANDARDS APPLIED TO CASE AFTER JURY VERDICT

One component part of the conspiracy directly applied to petitioner through which petitioner suffered the anti-competitive result of the conspiracy was the illegal strike at petitioner's mines during which UMW, pursuant to its agreement with BCOA, refused to bargain. The Trial Court affirmed the jury finding of the Sherman Act conspiracy. However, some three years after the jury verdict, the Trial Court chose to examine a portion of one component part of the conspiracy and declare it legal as

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[5] Findings as to design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. U. S. v. **Yellow Cab Co.**, 338 U.S. 338, 341 (1941).

[6] **Pennington** v. UMW [First Pennington], 325 F.2d 804; **Tennessee Consolidated Coal Company** v. UMW, 416 F.2d 1192; **Blue Diamond Coal Company** v. UMW, Civil Docket No. 6189, E.D. Tenn. (no appeal); **South-East Coal Co.** v. UMW and **Consolidation Coal Company**, 434 F.2d 767; **Scotia Coal Company** v. UMW, No. 76-2485 in the Sixth Circuit (1978).

a part of what the Trial Court termed a "national strike." No authority was cited for the holding of legality, and we know of none.[7] Having so found the strike to be legal, the Trial Court then wiped the slate clean as to the entire conspiracy and held that the strike could not be an illegal "materially contributing" cause of petitioner's damages. It simply ignored (as did the Fourth Circuit) the refusal to bargain with petitioner pursuant to its agreement with BCOA. It then found, as the jury had rejected, that all damages, as a matter of fact, stemmed from petitioner's hiring of rival union employees some six weeks after the onset of the illegal strike by UMW. The holding totally disregards the fact that petitioner would not have been required to hire rival union employees had it not been for the illegal strike or the refusal to bargain with petitioner. The holding further disregarded the fact that the strike depleted petitioner to the point it could not afford the terms of the new UMW-BCOA agreement.

The Fourth Circuit, on the other hand, recognized precisely what caused petitioner's damage.

> "After all is said and done. . . the fact remains that what the plaintiff is complaining of is that the Union struck its mines in October and that, *until there was some agreement*, it had refused to agree for its members to engage in maintenance work in the plaintiff's mines, *as a result of which* it was not able to continue the operation of its mines." 620 F.2d 416, 437 at Hn. 13.

However, unable to find a conspiracy based on unlawful purpose *and* anticompetitive results, the Fourth Circuit did not make any connection between the strike, the inability

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[7] In fact, as shown at pp. 24-25 of the Petition, the strike was not legal as a matter of labor law.

of UMW to make any agreement and the conspiracy found by the jury.

It is difficult to imagine how a court which is unable to find a conspiracy because it has used erroneous legal standards can legitimately determine that damages are not the proximate result of the very conspiracy it could not find. Petitioner respectfully submits that analysis of proximate cause is sheer folly if the wrong from which damage flows is not correctly identified in the first instance. Yet this is the course followed by the Fourth Circuit in affirming the District Court's disagreement with the jury.

THE PROVINCE OF THE JURY AND ITS SPECIAL VERDICT WERE INVADED BY BOTH COURTS BELOW

Every conceivable act which could possibly come within the spirit and purpose of the prohibition of the law, without regard to the garb in which such acts were clothed, are embraced within the first and second sections of the Sherman Act.[8] It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. It is not important whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be, within themselves, wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibitions.[9] Acceptance without previous agreement of an invitation to participate in a plan, the necessary consequence of which is the restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.[10]

[8] U. S. v. American Tobacco Company, 221 U.S. 106.

[9] American Tobacco Company v. U. S., 328 U.S. 781, 809.

[10] Interstate Circuit v. U. S., 306 U.S. 208, 227.

The jury in this case reached its decision by special verdict form upon instructions materially unchallenged. The review of that verdict ignores the fundamental principles stated above. In granting and affirming judgment N.O.V. both lower courts compartmentalized the proofs. That they did so meticulously is not disputed. That they did so erroneously is apparent. It matters not that the strike or the Coal Lands Clause might otherwise be legal if they were part and parcel of the overall scheme which the jury found to be unlawful. It is incorrect to take each and cast it aside having found it to be legal never considering it in the context of the overall scheme.

Yet the Trial Court ignored these basic propositions of antitrust law in setting aside the jury verdict on the proximate cause issue. The Fourth Circuit likewise erred in increasing petitioner's burden of proof at variance with the jury instructions.

Neither lower court considered the evidence that UMW's refusal to bargain after the illegal strike began was the result of a forfeiture of bargaining freedom to BCOA. Yet, this refusal to bargain is the crux of the conspiracy found by the jury. This forfeiture of bargaining freedom to the multiemployer group is what is condemned under the antitrust laws. This pure question of fact was resolved by the jury upon proper instructions.

CONCLUSION

The linchpin in UMW's opposition to review is the erroneous assertion that a successful Sherman Act plaintiff must prove both anticompetitive purpose and anticompetitive results. Since UMW and the Fourth Circuit are legally incorrect as to the requirements for making

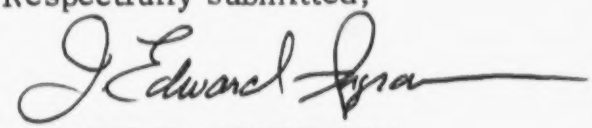
out a Sherman Act case, then they are likewise incorrect as to the proximate cause issue, and the province of the jury has, indeed, been usurped.

Both lower courts, long after the jury verdict, changed the legal principles without even noticing the instructions given the jury which were not only proper, but unchallenged by UMW.

A judgment N.O.V. cannot be sustained on an analysis of evidence under legal standards different from those given the jury.

This Court should grant the Petition in this case to correct these errors, and resolve the conflicts thereby engendered and to insure that fundamental justice is accomplished in this case by ordering the reinstatement of the jury verdict.

Respectfully submitted,



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